

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Marc Sobel)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
Certain Finder's Preferences)
)
Marc Sobel and Marc Sobel d/b/a)
Air Wave Communications)
)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

WT Docket No. 97-56

To: The Commission

SUPPLEMENT TO PETITION TO DEFER AND CONSOLIDATE CONSIDERATION

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney and pursuant to Section 1.41 of the Commission's Rules and Regulations, 47 C.F.R. § 1.41, and the First Amendment of the Constitution of the United States, hereby supplements his pending *Petition to Defer Action and Consolidate Consideration* ("Petition to Defer") submitted in this proceeding on March 2, 1999, in support whereof the following is respectfully shown:

By his *Petition to Defer*, Sobel has asked the Commission to: (a) defer its review of the *Initial Decision of Administrative Law Judge John M. Frysiak* (FCC 97D-13), released November 28, 1997 ("Sobel ID"), pending the issuance of an initial decision in WT Docket No. 94-147, the "Kay" proceeding; (b) consolidate consideration of the above-captioned case with any appeal from an initial decision in WT Docket No. 94-147; and/or take into consideration the initial decision and the record in WT Docket No. 94-147 to the extent it bears on the issues under review in this proceeding.

An initial decision has now been issued in WT Docket No. 94-147. *Initial Decision of Chief Administrative Law Judge Joseph Chachkin* (FCC 97D-13; released September 10, 1999) (“*Kay ID*”). A copy of the *Kay ID* is attached hereto for convenient reference. All issues were resolved in Kay’s favor, including the issues relating the relationship between Kay and Sobel and the impact of the *Sobel ID* on Kay’s qualifications. The Wireless Telecommunications Bureau has filed an appeal of the *Kay ID*, Kay has filed a timely reply brief in opposition to the Bureau’s appeal, and the matter is also now pending before the Commission. Sobel hereby renews his request that the Commission take into consideration the *Kay ID* and the record in WT Docket No. 94-147 in its deliberations on the above-captioned appeal.¹

There is an unavoidable connection between the Kay and Sobel proceedings. The sole substantive issue initially designated in the Sobel proceeding was whether or not Sobel had, by virtue of a management agreement between him and Kay, engaged in an unauthorized transfer of control of some of his stations to Kay.² After designation, the Bureau sought enlargement of the issues to add a misrepresentation and lack of candor charge against Sobel, alleging that an affidavit executed by Sobel in January of 1995 and submitted by Kay in WT Docket No. 94-147

¹ Now that both the Kay and Sobel matters are pending before the Commission for deliberation, Sobel respectfully asks that consideration and decision be expedited. Action on virtually ever application or request Sobel has had pending before the Commission has been frozen by the Bureau for five years. This has had a substantial adverse economic impact on Sobel, a sole proprietorship. If the Commission is for any reason unable to act expeditiously on this appeal, it should at a minimum direct the Bureau to process Sobel’s pending actions and requests with any grants to be issued conditioned on the outcome of this appeal.

² *WT Docket No. 97-56, Marc D. Sobel, Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture* (FCC 97-38), 12 F.C.C.R. 3298 (1997). Issue (a) was: “To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated Sec. 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.” *Id.* at ¶ 6(a). The remaining issues were to determine, in light of the evidence adduced under issue (a), whether Sobel possessed basic qualifications and how to dispose of his existing licenses and pending applications. *Id.* at ¶ 6(b)-(d).

was inconsistent with and failed to disclose the management agreement.³ Substantial evidence was adduced in the Kay proceeding relevant to both of these issues, and both findings of fact and conclusions of law relevant to these matters are included in the *Kay ID*.

In the *Kay ID*, The Chief Administrative Law Judge addresses both the transfer of control issue (*Kay ID*, Findings ¶¶ 143-167, Conclusions at ¶¶ 209-213) and the candor issue (*Kay ID*, Findings ¶¶ 168-173, Conclusions at ¶¶ 214-218). Sobel will not here repeat the matters addressed in his *Petition to Defer*,⁴ but rather will point out to the Commission the more important parts of the *Kay ID* that have direct relevance to this appeal. Some of the more important specific determinations are discussed below:

- a specific factual finding that Sobel was intimately involved in the application for, establishment, and management of his stations; that he did not passively accept Kay's input, even sometimes rejecting Kay's suggestions; and that he based decisions on his own extensive experience in and knowledge of the Los Angeles dispatch mobile radio business (*Kay ID*, Findings ¶ 145, 152-153);
- a specific factual finding that the relationship between Sobel and Kay was that of a facilities based licensee (Sobel) to a reseller of airtime capacity (Kay); a recognition and acknowledgement of the fact that under such a resale arrangement Kay would

³ The agreement and the affidavit were in the Bureau's possession for more than two years, during which time the Bureau never sought an enlargement of the issues in the Kay proceeding on either transfer of control or lack of candor grounds, nor did the Bureau (which drafted the designation order in this proceeding) recommend the designation of a candor issue in this proceeding. Nonetheless, *only one week after* Sobel filed a pre-trial pleading asserting that an unauthorized transfer of control, even if proved, would not support license revocation in the absence of an intent to deceive the Commission or other disqualifying misconduct, the Bureau filed a motion to enlarge, pretending to have come to the sudden realization that information in its possession for more than two years was suddenly of major significance.

⁴ In the *Petition to Defer*, Sobel provided the Commission with excerpts of the relevant portions of the record from WT Docket No. 94-147 and discussed the relevance such evidence had to consideration of the above-captioned appeal.

naturally be the one to bill and collect funds from end users (*Kay ID*, Findings ¶ 150, 152, 156-157);

- a specific factual finding that Sobel had valid and sound business reasons for the nature and structure of his arrangement with Kay as to the 800 MHz licenses (*Kay ID*, Findings ¶ 151);
- a specific factual finding that the sharing of common transmitter sites between different licensees, sometimes even competitors, in the Los Angeles area is a common practice; and that Sobel's sharing of antenna sites with Kay is consistent with this practice (*Kay ID*, Findings ¶ 155);
- a specific factual finding that, although the station equipment is owned by Kay, it is in fact leased by Sobel (*Kay ID*, Findings ¶ 166);
- a specific recognition of the fact that the information on which the candor issue is based (the written management agreement and the January 1995 pleading submitted by Kay in WT Docket No. 94-147) had been in the Commission's and the Bureau's possession for two years before the Bureau ever sought an issue based on it (*Kay ID*, Findings ¶ 174);
- a specific factual finding that Sobel had attempted, long before initiation of this proceeding, to clarify an apparent misunderstanding by Bureau staff as to his identity vis-à-vis Kay, only to have such efforts totally ignored by the Bureau (*Kay ID*, Findings ¶ 159);
- a specific factual finding that Sobel requested that his oral arrangement with Kay as to the 800 MHz stations be reduced to writing precisely because of the Bureau's apparent misunderstanding and to document and clarify that he was a separate person and business entity from Kay; that Sobel relied on communications legal counsel to prepare such an agreement; and that he was provided with what was represented to

him as a standard boilerplate agreement that complied with applicable FCC requirements (*Kay ID*, Findings ¶¶ 160-161);

- a specific recognition of the express language in the written agreement reserving ultimate control over the licensed station to Sobel (*Kay ID*, Findings at ¶ 162);
- a specific factual finding that the parties (Kay and Sobel) were obviously aware of the written management agreement when, in January of 1995, they executed affidavits that had been prepared by the same legal counsel who had drafted the agreements only three months earlier (*Kay ID*, Findings ¶ 172);
- a legal conclusion that, even if an unauthorized transfer of control were found, disqualification and revocation is a far too drastic and inappropriate sanction (*Kay ID*, Conclusions ¶¶ 212-213);
- a legal conclusion that Judge Frysiak's recommended disqualification of Sobel was based on incomplete information because of selective presentation by the Bureau in order to create a false impression of Sobel's candor (*Kay ID*, Conclusions ¶ 210); and
- a specific demeanor finding that "Kay and Sobel testified ... and answered questions put to them in a candid and forthright manner" and that "[t]heir testimony that they did not intend to deceive the Commission concerning their business dealings is entirely credible and is accepted." (*Kay ID*, Findings ¶ 173);

These findings and conclusions are, of course, fully supported by the record in the Kay proceeding, particularly in the transcript excerpts provided to the Commission with the *Petition to Defer* and the hearing exhibits referred to therein. More importantly, however, each of these findings and conclusions is equally supported by the record in *this* proceeding, but were ignored by Judge Frysiak. It is respectfully submitted that the Commission must take the findings and

conclusions of its Chief Administrative Law Judge in WT Docket No. 94-147 into account in its consideration of this appeal, particularly since the record in this proceeding would support similar findings and conclusions.

Respectfully submitted,

By: 

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Dated: November 29, 1999

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
JAMES A. KAY, JR.) WT DOCKET NO. 94-147
)
Licensee of One Hundred Fifty Two Part 90)
Licenses in the Los Angeles, California Area)

Appearances

Robert J. Keller and Aaron Shainis, on behalf of James A. Kay, Jr.; and William H. Knowles-Kellett and John J. Schauble, on behalf of the Wireless Telecommunications Bureau.

INITIAL DECISION
OF
CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: September 7, 1999

Released: September 10, 1999

Preliminary Statement

1. James A. Kay, Jr. (Kay), is the licensee of 152 stations in the greater Los Angeles area. WTB Ex. 290. By Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing for Forfeiture, 10 FCC Rcd 2062 (released December 13, 1994) (Show Cause Order), the Commission commenced the instant proceeding to determine ultimately whether the licenses for these stations should be revoked.¹

2. The Show Cause Order in this case designated eight issues, located at subparagraphs 10(a) through 10(h), for resolution by the Presiding Administrative Law Judge:

(a) To determine whether James A. Kay, Jr. has violated Section 308(b) of the Act and/or Section 1.17 of the Commission's Rules, by failing to provide information requested in his responses to Commission inquiries;

¹ The original caption in the HDO specified one hundred sixty-four Party 90 licenses. Attachment A to the HDO set forth a list of the 164 subject call signs. In addition to stations licensed to Kay or to companies owned by him, this list also included one authorization held by Multiple M Enterprises, Inc., HDO, Attachment A, item 153, and eleven authorizations held by Marc Sobel. HDO, Attachment A, items 154-164. In May 1996, the Commission modified the HDO by deleting the facilities licensed to MME and Sobel and by changing the caption to specify one hundred fifty two Part 90 licenses. Order (FCC 96-200), 11 FCC Rcd 5324 (1996).

- (b) To determine whether James A. Kay, Jr. has willfully or repeatedly operated a conventional station in the trunked mode in violation of Section 90.113 of the Commission's Rules;
- (c) To determine if Kay has willfully or repeatedly violated any of the Commission's construction and operation requirements in violation of Sections 90.115, 90.157, 90.313, 90.623, 90.627, 90.631, and 990.633 of the Commission's Rules;
- (d) To determine whether James A. Kay, Jr. has abused the Commission's processes by filing applications in multiple names in order to avoid compliance with the Commission's channel sharing and recovery provisions in violation of Sections 90.623 and 90.629;
- (e) To determine whether James A. Kay, Jr. willfully or maliciously interfered with the radio communications of other systems, in violation of Sections 333 of the Act;
- (f) To determine whether James A. Kay Jr. has abused the Commission's processes in order to obtain cancellation of other licenses;
- (g) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James a. Kay, Jr. is qualified to remain a Commission licensee;
- (h) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result of violations listed in subparagraph (c) pursuant to Sections 90.155, 90.157, 90.631 or 90.633 of the Commission's rules; and [sic]

10 FCC Rcd at 2064-65.

3. On May 31, 1966, Judge Sippel, the Presiding Judge, issued a summary decision whereby he, inter alia, disqualified Kay and revoked all of his Title III authorizations. Summary Decision of Administrative Law Judge Richard L. Sippel, 11 FCC Rcd 6585 (1996). Kay appealed this ruling, and its effectiveness was automatically stayed pursuant to Section 1.276(d) of the Commission's Rules. 47 C.F.R. § 1.276(d). In February 1997 the Commission reversed the summary decision and remanded the case for hearing. James A. Kay, Jr., 12 FCC Rcd 2898 (OGC 1997)..

4. By Memorandum Opinion and Order, FCC 98M-94 (released July 15, 1998), issues (b) and (f) were resolved in Kay's favor by summary decision. Similarly issue (d), with respect to Sections 90.629, and 90.627, was resolved in Kay's favor. Id. The order notes that the reference to Section 90.629 of the Commission's Rules should have been to 90.627. Id. (Section 90.627 of the Commission's Rules is still properly the subject of subparagraph 10(c)).

5. By Memorandum Opinion and Order, FCC 98M-15 (released February 2, 1998), the Presiding Judge added the following issues:

To determine, based on the findings and conclusions of Initial Decision FCC 97D-13 reached in WT Docket No. 97-56 concerning James A. Kay, Jr.'s (Kay) participation in an unauthorized transfer of control, whether Kay is basically qualified to be a Commission licensee.

To determine whether James A. Kay, Jr. misrepresented facts or lacked candor in presenting a Motion To Enlarge, Change, or Delete Issues that was filed by Kay on January 12, 1995, and January 25, 1995.

To determine whether in light of the evidence adduced under the aforementioned added issues whether James A. Kay, Jr. is qualified to hold a Commission license.

6. By Order, FCC 98-274 (released October 19, 1998), the Commission ordered the appointment of a new Administrative Law Judge to preside over this case. By Order, FCC 98M-122 (released October 30, 1998), Chief Judge Joseph Chachkin appointed himself to preside over the proceeding. The evidentiary admissions session was held on November 30, 1998. Hearing sessions were held in Washington, D.C., on December 21, 22, 23, 28, 29, and 30, 1998; and January 11, 12, 13, 14, 19, and 20, 1999. The record in this proceeding was closed on January 20, 1999. Tr. 2565. Proposed findings were filed by the parties on May 10, 1999. Replies were filed on June 1, 1999.

7. In accordance with the requirements of Section 312 of the Communications Act of 1934, as amended, (the "Act") and paragraph 15 of the Show Cause Order, the Wireless Telecommunications Bureau (the "Bureau") has the burden of proceeding with the introduction of evidence and the burden of proof with respect to all issues.

Findings of Fact

General Background

8. Kay operates Part 90 land mobile radio facilities in the Los Angeles, California, area. He has been involved in the radio field since approximately 1972 or 1973. Tr. 859. He began providing two-way mobile service to others on a commercial basis in approximately 1982 to 1984. Tr. 859-860. He is the President and sole shareholder of Buddy Corp., which operates under the fictitious business name of Southland Communications. Southland is engaged primarily in the sales, service, installation, and maintenance of mobile radios and two-way mobile radios systems. He also operates a sole proprietorship under the name of Lucky's Two-Way Radio. Lucky's sells repeater service, rents repeater site space, and provides technical consulting services. Tr. 861.

9. Lucky's provides repeater service, i.e., commercial mobile radio service to end users, and Southland does equipment sales, leasing, installation, and maintenance. Tr. 862. While many customers obtain their equipment from Southland and their repeater service from Lucky's, not all do. A customer might obtain radios from a source other than Southland, but obtain repeater service from Lucky's. Similarly, a customer might obtain radios from Southland, but use them with a repeater service obtained from a source other than Kay. Tr. 863. Both Lucky's and Southland are located in the same building, Kay's shop in Van Nuys. Tr. 2271.

Section 308(b) Issue

The Initial Section 308(b) Correspondence

10. By letter dated January 31, 1994, and directed to Kay, the Bureau requested various information pursuant to Section 308(b) of the Communications Act. WTB Ex. 1. This letter (hereinafter referred to as the "308(b) Request") stated: "The Commission has received complaints questioning the construction and operational status of a number of your licensed facilities.... The complaints allege that the licensed loading of your facilities does not realistically represent the actual loading of the facilities, thereby resulting in the warehousing of spectrum." WTB Ex. 1 at p. 1 (underlining in original). Neither the identity of the complainants nor the specifics of any alleged complaint was disclosed. Id.

11. The 308(b) Request directed Kay to produce a list of all Kay's customers, including "the user name, business address and phone number, and a contact person." WTB Ex. 1 at p. 2. It also sought complete details regarding the technical configuration of Kay's systems and the operations of Kay's customers, including the number of mobile units and control stations operated by each user and the number of units operated on each of Kay's stations. Id. In addition, the 308(b) Request asked for an alphabetical list of the call signs and licensee names for all facilities owned or operated by Kay or any companies through which he does business;² annotated to show what facilities are located on U.S. Forest Service land; the original license grant date for each station and the date the facility was constructed and placed into operation; copies of all U.S. Forest Service permits;³ and an explanation for the lack of a U.S. Forest Service permit for any station located on U.S. Forest Service land. Id. at p. 1.

12. Kay received the letter shortly after January 31, 1994, only two weeks after the Northridge earthquake that had done extensive damage to his business and his residence. Tr. 2340-2341. He read it and he understood that it was asking him to provide the specified

² The Bureau conceded at the hearing that it could have easily obtained from its own files the call signs and licenses issued to Kay and limited its inquiry to companies through which Kay does business. (See Tr. 2350-2354).

³ The Bureau asserted at a prehearing conference that it needed Kay's copies of the permits to compare them with copies obtained from the U.S. Forest Service. Tr. 175. Contrary to this assertion, the Bureau never obtained copies from the U.S. Forest Service, Tr. 2091-2108, and relied solely on Kay's copies.

information. Tr. 865. Kay believed it would have been virtually impossible to have supplied the requested information at that time, partly because his business had been severely damaged by the Northridge earthquake that had occurred less than two weeks prior to the 308(b) Request. Tr. 2340-2341, and also because "[t]he request was so massive, it was impossible to deal with." Tr. 2342. Later, in response to discovery requests, Kay produced virtually all of the same information requested in the 308(b) Request. The task required more than three of his staff to devote almost three months to nothing but this project, and it also required 40 to 60 hours of his personal time to compile the information. And this was all done in 1995, after he had "more or less" put the company back together after the earthquake. Kay ultimately produced over 36,000 documents to the Bureau in discovery, and he estimates that only 2,000 to 4,000 documents less would have been required to comply with the 308(b) Request. Tr. 2355. Kay stated that during the weeks and months following the earthquake, it would have been literally impossible to have complied with the Section 308(b) Request, because he had no staff, no personal availability, and everything was in total disarray. Tr. 2355-2356.

13. When Kay received the Section 308(b) letter, he faxed it to his Washington, D.C. communications law firm, Brown & Schwaninger, to assist him in responding to the Section 308(b) letter. Brown & Schwaninger had represented Kay on FCC-related matters since the late 1980's and continued to do so until approximately mid-1995. Tr. 866, 2339. Kay instructed Brown to review and prepare a response to the letter. Tr. 2339.

14. The 308(b) Request was the first in a series of letters exchanged between the Bureau and Brown & Schwaninger.⁴ The initial 308(b) Request was in a letter, dated January 31, 1994, from the Bureau, addressed to Kay, and indicating delivery via both regular mail and certified mail -- return receipt requested. WTB Ex. 1.

15. Dennis C. Brown, a partner at Brown & Schwaninger, responded with a letter, dated February 16, 1994, in which he specifically sought "written assurance that any information which Kay submits... will be held in strictest confidence and will not be disclosed under any circumstances to any person who is not a Commission employee." WTB Ex. 348 at p. 1. Brown further requested that Kay be afforded immunity from any forfeiture action or criminal prosecution based on any information supplied, and asked that the running of the sixty day response period be tolled pending action on the requests set forth in the letter. *Id.* at p. 2. Kay received a copy of this letter on or shortly after February 16, 1994, but did not recall whether he saw an advance draft of it. Kay stated that upon receipt of the letter he would have read or scanned through it. Tr. 1027. Kay did not recall whether he was specifically aware that his attorneys were making the request for immunity, but "conclude[d] that my attorneys were acting in an abundance of caution on my behalf." Tr. 1028.

⁴ Most of the Bureau's letters after the initial request were addressed to Dennis C Brown, Esquire, of Brown & Schwaninger, but in three instances (see WTB Ex. 4 and Kay Exs. 49 & 54) the Bureau wrote directly to Kay.

16. The Bureau responded with a letter, dated March 1, 1994, addressed to Brown. WTB Ex. 349. The Bureau stated that if Kay wished to have submitted material withheld from public inspection he would be required to submit such a request concurrently with the submission of the materials. The Bureau further stated that Brown's February 16, 1994, letter "is not considered a request that information submitted... be withheld from public scrutiny." *Id.* at p. 1. The request for immunity was summarily denied on the stated grounds that "Congress has not provided for immunity when responding to [Section 308(b)] requests." *Id.* The deadline for responding to the 308(b) Request was extended to April 14, 1994. *Id.* at p. 2. Kay considered this letter to be essentially a denial of his request for confidentiality. Tr. 1029.

17. On April 7, 1994, Brown wrote two letters to the Bureau. In the first letter (WTB Ex. 2), Brown specifically requested confidential treatment pursuant to Section 0.459 of the Commission's Rules. Brown sought confidential treatment to prevent an unwarranted invasion of privacy in that Kay was submitting (via Brown's second April 7 letter) personal information. WTB Ex. 2 at pp. 1-2. Brown also requested confidentiality on competitive grounds. The letter specifically advised the Bureau as follows:

Mr. Kay has learned that some of his competitors have obtained copies of the [308(b) Request] and have already made competitive use of the fact of the request to disparage his reputation in the radio communications service market. Affiliates of some of Mr. Kay's competitors have informed him that his competitors intend to obtain the information which he is submitting and distribute it in the Los Angeles area in an effort to disparage him among his customers. Mr. Kay is also reliably informed that some of his competitors intend to use the information to probe for weaknesses, if any, in his business strategy, and to solicit his current customers directly.

WTB Ex. 2 at p. 2.

18. In the second letter dated April 7, 1994 (WTB Ex. 3), Brown addressed the substance of the 308(b) Request. He presented a number of legal objections and challenges to the scope of the request and the Bureau's statutory right to seek the requested information. As to some of the requested information, Brown informed the Bureau that it already had the requested information or that Kay was not required to maintain the requested information. For example, the Bureau obviously already knew the call signs of the stations licensed to Kay as well as the dates the licenses were granted. WTB Ex. 3 at pp. 1-2. Brown challenged the Commission's jurisdiction to inquire into the status of Kay's U.S. Forest Service Permits, and he also explained that, under USFS procedures, the lack of permit as to a particular facility was not probative evidence of non-construction as the Bureau's Section 308(b) letter "presumed." *Id.* at pp. 3-4.

19. As to the specific requests for loading information, Brown stated that the request "is not sufficiently specific for [Kay] to supply the requested information." It was explained that the loading of Kay's systems fluctuates over time, from hour to hour, day to day, and season to season. *Id.* at p. 5. Brown also noted that Commission regulations in effect at the time did not require Kay to know the loading at a given point in time, but rather only when he made certain

requests, e.g., requests to add channels or renew facilities where the issuance of the requested authorization is subject to a certain level of loading. *Id.* at p. 6. Brown further stated that Kay had already provided the Commission with the loading information for his 800 MHz stations after the complaints alluded to the 308(b) Request had been filed. *Id.*

20. Brown's second April 7 letter also expressed grave concerns about the scope of the 308(b) Request. Brown noted that the Bureau "essentially requests that Mr. Kay tell the Commission everything about everything." He went on to state that the "request is unduly and unreasonably burdensome in light of the local conditions of the Los Angeles market." In this connection he expressly advised the Bureau that "Kay is still spending a substantial part of each day recovering from the Northridge earthquake of earlier this year." *Id.* at p. 6.

21. Brown considered that Kay had discharged his statutory obligation under Section 308(b). Indeed, Brown expressly stated:

By submission of the foregoing, Mr. Kay avers that he has fulfilled his obligation in accord with 47 C.F.R. §308(b) by substantively responding to the Commission's letter of inquiry in all respects, including the exercise of his right to decline an invitation to provide information when the request is outside the scope of the law. Mr. Kay stands ready to cooperate with the Commission in all respects which are reasonable calculated to forward the legitimate exercise of the Commission's authority in the fulfillment of its statutory duties. Accordingly, nothing contained herein should be deemed to be a failure by Mr. Kay to comply with all requirements of law.

WTB Ex. 3 at p. 6.

22. Kay received copies of and scanned through two letters sent by Brown & Schwaninger to the Bureau, both dated April 7, 1994 (WTB Exs. 2 & 3). Tr. 2341, 2343. He did not read them carefully, word for word, because he was, during that period, extremely busy dealing with the aftermath of the Northridge earthquake that had occurred on January 17, 1994. During this time Kay was devoting an inordinate amount of time to earthquake recovery, assisting customers, meeting his financial obligations--all while coping with the aftershocks that continued for some six months following the main earthquake. Tr. 2343-2344. Similarly, Kay did not review word for word, nor did he carefully analyze, the Bureau's May 20, 1994 letter to Brown (WTB Ex. 6). Tr. 2356-2357. As Kay explained, while he was in the midst of recovering from the devastating earthquake, he "had assigned the task to [his] attorneys to deal with the Commission, to explain to them the situation we were in, and they were responding to it." Tr. 2357.

Kay's Concerns Regarding Confidentiality

23. Both Kay and his legal counsel had considered the Bureau's March 1, 1994, letter (WTB Ex. 349), a denial of Kay's request for confidentiality, Tr. 1028-1029; WTB Ex. 3 at p. 5. Although the Bureau held open the possibility that Kay could submit a formal request for confidentiality pursuant to Section 0.459 of the Rules, Kay understood that this request would have to be accompanied by the very materials he was seeking to keep confidential. Tr. 1029-1030. He was very much concerned about a process that required him to submit all the documents and then have the Bureau staff make an after-the-fact determination as to which documents would be publicly released. Tr. 1030-1031.⁵ Accordingly, both of the April 7, 1994, letters included copyright notices across the bottom of each page, stating as follows: "Entire contents copyright, James A. Kay, Jr. 1994. All right reserved. No portion of this document may be copied or reproduced by any means." WTB Exs. 2&3.

24. On May 11, 1994, a month after Brown's April 7 letters containing the copyright notice, the Bureau wrote a letter directly to Kay stating that information was required in response to the 308(b) Request before the Commission could process certain of Kay's pending applications. WTB Ex. 4. The Bureau stated: "Please be advised that if you claim copyright protection in your response, we require that you file 50 copies of your response...as well as a full justification of how the copyright laws apply, including statutory and case cites...." *Id.* When Kay received this letter he "was totally incredulous." Tr. 2344. He explained:

I knew of no reason whatsoever why the Commission would ever want 50 copies of the most confidential information of my company for any other purpose but to distribute it. We had asked for confidentiality, they had refused. When we said we were going to copyright it, now they want 50 copies of it. I had dealt with the Commission before and requests of confidentiality had been routinely granted. It was customary, it was never a problem receiving confidentiality from the Commission. And, here they were denying it. Then we said, well, we have to get this somehow. We're going to copyright it and they want 50 copies. What could they possibly want 50 copies for, but to give it to exactly everybody I didn't want to have it? My competitors who are public and who knows who, anybody conceivably that asked for it. I just couldn't do that. I was flabbergasted and dismayed.

Tr. 2344-2345. Just two days later, on May 13, 1994, the Bureau sent a virtually identical letter directly to Kay, making the same request in connection with another pending application and

⁵ This procedure was also problematic for Kay in terms of the scope of the Bureau's request. As Brown had pointed out in his February 16, 1994, the Bureau was seeking "essentially all of the records which constitute Mr. Kay's business." WTB Ex. 348 at p. 1. In order to fully and unconditionally comply with the 308(b) Request, Kay would have been required to produce virtually all of the same documents he ultimately produced to the Bureau in discovery, namely, approximately 36,000 documents which took his staff about three months to compile. Tr. 1030-1031. Responding to the 308(b) Request would have required the production of only a few thousand less documents, but it "still would have been in the mid-thirty-thousand range of documents." Tr. 1040.

containing the same language requesting 50 copies if Kay sought copyright protection for his response. Kay Ex. 49.

25. Kay's interpretation of Bureau's initial reaction to his requests for confidentiality was colored in part by his past dealings with the Bureau regarding casual requests for confidential treatment. Kay explained as follows:

I know from past experience with the Commission that with extremely sensitive material the Commission has permitted licensees to loan but not submit material to the Commission. Therefore, the material never becomes the property of the Commission and is then returned. I had past experience with the Commission of submitting confidential materials to them, including highly sensitive, competitive material, which was handled by the Commission on that basis and was returned to me. I knew how it was handled when it was handled properly.

We requested confidentiality in basically the same fashion this time, my attorneys did, as was handled in, I think it was somewhere around mid-'93, when I requested confidentiality up front, and they said yes. And I said, okay, I'll submit it. You're free to read it for the record, and please return. And the material was marked copyright, proprietary, confidential, and its return was requested, and the material was returned by the Commission, and it worked fine about six months or seven months previous to the 308(b). So I have experience with that. This time they denied confidentiality, then they wanted 50 copies, then they quoted FOIA language to me. What do you want me to believe?

Tr. 944-945. Kay was extremely concerned because the 308(b) Request was seeking "literally the entirety of the most confidential information of my company." Tr. 2342.

26. On May 17, 1994, Brown responded to the Bureau's May 11 and May 13, 1994, letters, WTB Ex. 5, and specifically challenged the Bureau on the request for 50 copies:

We respectfully note that we have filed the number of copies of Mr. Kay response which are required to be filed by Section 1.51 of the Commission's Rules. However, you have requested 50 additional copies ... Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay's response beyond the Commission. It was specifically to prevent such distribution that ... that Mr. Kay requested confidentiality for his response and provided the Commission with notice of his copyright.

WTB Ex. 5 at p. 1.

27. In Brown's May 17, 1994, letter challenging the request for 50 copies (WTB Ex. 5), Brown reiterated some of the same legal objections to the 308(b) Request that he had set forth in his second April 7, 1994, letter (WTB Ex. 3). Brown further put forth arguments

demonstrating that the information requested in the 308(b) Request was not relevant to the resolution of any of the specific pending applications addressed in the Bureau's May 11 and May 13, 1994, letters. WTB Ex. 5 at pp. 2-3. Brown suggested that progress could be made on the matter if the Bureau would request specific information concerning each of the specified applications rather than pursuing an open-ended request that essentially required Kay to produce virtually all of his business records without any guidance as to what the Bureau was seeking or what its specific concerns might be. *Id.* at p. 4. The record does not reflect that the Bureau ever acknowledged or answered Brown's May 17, 1994, letter.

28. The Bureau responded to Brown's April 7, 1994, letters (*i.e.*, WTB Exs. 2&3) on May 20, 1994, WTB Ex. 6.⁶ The Bureau concluded that Brown's April 7 letter "is inadequate, evasive, and contrived to avoid full and candid disclosure to the Commission." The Bureau went on to call it "a studied effort to avoid producing any information." WTB Ex. 6 at p. 1. The Bureau stated that "[w]ith respect to Kay's request that information provided to the Commission in response to our inquiry be withheld from public inspection, we will not make those materials which are specifically listed under the provisions of [the Commission regulations implementing the Freedom of Information Act] routinely available for public inspection." *Id.* Kay viewed this not so much as a grant of confidentiality, but rather as the Bureau simply quoting the FOIA rules. Tr. 926.

29. Kay's confidentiality concerns did not arise in a vacuum. Shortly after Kay received the Section 308(b) letter, he became aware that his competitors had a copy of it and were showing it around the Los Angeles mobile radio community. Tr. 2498-2499. As the result of some FOIA litigation against the Commission, in the fall of 1994, Kay learned that the Bureau had, in fact, contemporaneously sent blind carbon copies of the Section 308(b) letter to at least six different individuals who were competitors, customers, and/or potential customers of Kay. Tr. 2497-2498; Kay Ex. 62.

30. Knowing that his competitors were already using the letter against him, and that they would certainly attempt to get their hands on any information Kay produced in response to it, Kay had asked that his response not be made available for public inspection. When the Bureau refused this request, Kay's attorneys then indicated that the responses would be copyrighted, and even placed a copyright notice across the bottom of their substantive communications with the Bureau on the subject. At that point the Bureau demanded 50 copies of the materials to be produced. Tr. 2344-2345.

31. Competitive considerations were not the only basis for Kay's confidentiality concerns. In addition to seeking the identity and contacts for Kay's customers, the Bureau was also seeking information regarding the configuration of the customers' systems. Kay believed he had a duty

⁶ The May 20 letter stated that it was responding to an April 8, 1994, letter, but it is clear from the context that it was in response to both the April 7 substantive response (WTB Ex. 3) and the April 7 request for confidentiality (WTB Ex. 2).

to his customers, over and beyond his own self-interest, to hold such information in the strictest confidence. He testified as follows:

The release of that information to the public would not only adversely affect my company, but my customers, as well. It is -- radio shops just do not release the system configuration of their customers' radio systems to the public. It's like releasing private citizens' cellular telephone numbers. It's just simply not done.

The consequences to my company would be direct and economic. It would probably ruin my company. My customers expect me to maintain confidentiality of their records and their system configurations. I can't just release customers' information to the public. Can you imagine the liability of releasing an armored transport company's frequency codes to the public? All it takes is one robbery where the bad guys know the frequency information and there's big trouble

The same goes with alarm response companies and armed guard companies. We just cannot release that information to the public under any circumstances. To do so would endanger lives and property of my customers, their employees, and the liability to my company would be incredible.

Tr. 2342-2343.

32. In April 1994, before Kay's response to the 308(b) Request was due, an event occurred which increased Kay's suspicions and apprehension that the Bureau staff was acting in bad faith. At the time of the 308(b) Request, Kay had pending before the Commission a request pursuant to the Commission's "finder's preference" program in which he was seeking a dispositive preference for a frequency that had been abandoned by another licensee, Thompson Tree Service. The purpose of the finder's preference program was to promote efficient spectrum utilization by encouraging licensees to locate unused authorizations. Such "finders" were rewarded with dispositive preferences allowing them to apply for the abandoned channel without being subject to competing challenges. Tr. 2345-2346.

33. Kay had previously written to the Bureau explaining that the Thompson Tree facility had been abandoned, and informally asking that the authorization be canceled in FCC's rules. He later filed the formal finder's preference request when the Bureau did not act on his informal request. In response to Bureau inquiries, Thompson Tree admitted that it had stopped using the station more than two years earlier, but expressed a desire to nonetheless retain the license in order to preserve the investment they had in the station. Kay thereupon contacted Gail Thompson of Thompson Tree and reached an accommodation with her whereby Thompson Tree would acquiesce in the cancellation of its license and Kay would provide it with repeater service so they would not lose their investment in their radio system. Tr. 2347.

34. About a week to ten days later, Gail Thompson called Kay to report that she had just received an unsolicited telephone call from Anne Marie Wypijewski, the Bureau staff person

handling Kay's finder's preference request. Wypijewski advised her that the Bureau had no choice but to cancel the Thompson Tree authorization and would be doing so shortly, but that Thompson Tree could immediately reapply for the authorization. Wypijewski did not formally advise Kay of the denial of his finder's preference request until about a week after Wypijewski's telephone call to Gail Thompson. Tr. 2347, 2547.

35. Kay viewed Wypijewski's actions as a blatantly improper maneuver which destroyed any confidence he might otherwise have had that information he provided to the Bureau would be held in confidence or that the Bureau was acting in good faith. As he explained:

This was equivalent to a judge - because Anne Marie is decision-making staff acting, in fact, as a judge, weighing our finder's preference, releasing what she's going to do, how she's going to rule, before she releases the ruling, to tell Mrs. Thompson how to beat the effect of the ruling, to literally take from me that which I had reported in good faith to the Commission and had filed as a finder's preference. It was, to me, a direct stab at me to take away that which I had worked for, that I had in accordance with the rules, properly filed and was, in fact, an invalid license. She was taking away from me that which I had worked for and was doing it without notifying me.

I was thoroughly of the opinion it was highly improper if not what they call ex parte representation made. This wasn't Mrs. Thompson calling in to check on something. This was Anne Marie going out of her way to tell Mrs. Thompson how to beat James Kay on a perfectly legitimate finder's preference and a perfectly legitimate report that Mrs. Thompson's license is canceled automatically. It was a way of sticking me and to help Mrs. Thompson and it just plain was wrong....

I can't trust the Commission to play by the rules and maintain confidentiality, but going out of their way to make telephone calls to tip people off how to beat me, with pre-release of decision material, how can I trust them?

Tr. 234-2350.

36. Apart from the communications by Wypijewski, Kay viewed the denial of his finder's preference request in and of itself as yet a further indication of the Bureau's bad faith. The Bureau denied the request on the stated ground that the station was already the subject of an investigation at the time it was filed. Tr. 2526. Kay was knowledgeable of the finder's preference procedures, having filed between eight and fifteen such requests during his career. Tr. 2547. He understood that the policy of denying a finder's preference request on the basis of an existing investigation is intended to prevent a licensee from taking advantage of investigatory and enforcement work already undertaken by the Commission. In other words, the rationale of the finder's preference program is to encourage licensees to seek out fallow channels and then reward them for their efforts—not to allow them to simply piggy back on somebody else's work. Tr. 2548-2549. But in this case the ostensible "existing investigation" was nothing more than the informal letter Kay himself had previously filed calling the matter to the Commission's

intention. Tr. 2525, 2549-2550. Kay had never heard of a finder's preference being denied on the sole ground that the party requesting the preference had already informally brought the matter to the Commission's attention prior to formally submitting the request. In Kay's words: "It was unique. I think to this day it remains unique." Tr. 2550-2551.

37. Brown confronted the Bureau a second time regarding the request for 50 copies. In a letter dated May 26, 1994, Brown again asserted that the "request that [Kay] submit 50 copies...clearly indicates [an] intent to disclose information to a substantial number of members of the public, even though Kay has not received notice ... that any person had requested the information." WTB Ex. 9 at pp. 2-3. Brown went on to explain that Kay was asked to provide the names, addresses, phone numbers, and contacts of his business customers, in addition to the operating particulars of their accounts. Brown expressly advised the Bureau that "Kay has no confidence that the Commission would not disclose such crucial information to other persons, whether routinely or non-routinely." Brown expressly and specifically asked for comment and clarification as to this point. *Id.* at p. 3. The next day, on May 27, 1994, the Bureau, wrote a response to Brown. WTB Ex. 10. While addressing various other points raised in Brown's May 26 letter, the Bureau neither acknowledged nor answered Brown's pointed and explicit expression of concern and request for clarification as to the demand for 50 copies of Kay's responsive materials. *Id.*

Efforts to Clarify and Narrow the Scope of the 308(b) Request

38. Brown again wrote to the Bureau on May 25, 1994, this time seeking clarification of the 308(b) Request. WTB Ex. 7. Brown wrote:

In your letter dated May 20, 1994 ..., you indicated the Commission would be willing to clarify its request Your letter to Mr. Kay dated January 31, 1994, had not indicated that any clarification might either be required or provided. However, your letter dated May 20 indicates that clarification might be possible. Accordingly, we respectfully request clarification of certain portions of the Commission's request.

Id. at p. 1.

39. Brown first sought clarification as to which specific facilities were the subject of the Bureau's concern. The 308(b) Request, he reasoned, stated that it was prompted by complaints--the details of which the Bureau had thus far refused to disclose to Kay--that must reference specific facilities and particular alleged violations. "However, rather than requesting information concerning those facilities about which it had reportedly received complaints, the Commission has requested essentially all of the information which Mr. Kay might have concerning all of the stations which he operates." *Id.* Thus, Brown asked that the Bureau clarify the 308(b) Request "such that it specif[y] the facilities about which complaints are being held and such that it request[] information only about the specific stations and only such information as would allow the Commission to ascertain the veracity of the complaints." *Id.* at pp. 1-2. Brown explained

that the clarification would "allow Mr. Kay to confront directly the exact accusations which have reportedly been made against him." Id. at p. 2.⁷

40. On the next day, May 26, 1994, the Bureau issued a terse letter summarily rejecting the request for clarification, stating:

The Commission's request asks for basic information that Mr. Kay would have readily available if he is indeed providing communication services to customers. In fact, such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed.

WTB Ex. 8 at p. 1. Confronted with this refusal to disclose the particular substance of the alleged complaints against Kay, Brown immediately wrote to the Bureau on May 26, 1994, seeking more specific clarification of each of the items contained in the 308(b) Request and asking that the Bureau reconsider its May 26 letter. WTB Ex. 9. The Bureau similarly rejected this request in a letter dated May 27, 1994. WTB Ex. 10.

The Substantive Response to the 308(b) Request

41. The 308(b) Request, dated January 31, 1994, initially called for a response within 60 days, i.e., by Friday, April 1, 1994. WTB Ex. 1 at p. 2. By letter dated March 1, 1994, the Bureau had extended the deadline thirteen days to April 14, 1994. WTB Ex. 349 at p. 2. On May 20, 1994, the Bureau effectively extended the response date to June 3, 1994. WTB Ex. 6 at pp. 1&3. Brown repeatedly thereafter sought a further extension of the deadline, citing among other things pending FOIA litigation in which Kay was attempting to secure production of the alleged complaints against him, WTB Exs. 7&9, but the Bureau consistently refused to extend the response date beyond June 3, 1994, WTB Exs. 8 & 10.

42. On June 2 1994, Brown submitted a substantive response to the 308(b) Request. WTB Ex. 11. It was accompanied by a declaration in which Kay verified the accuracy of the factual assertions contained in the letter. WTB Ex. 11 at p. 7. Kay testified: "I could only certify to the factual information that would be within the scope of my knowledge...contained in there, and I would have not have signed the declaration if I detected any errors." Tr. 932. Brown's June 2 letter first explained that Kay had an interest in two closely held corporations, Buddy Corp. and Oat Trunking Group, Inc., and that Kay "does not operate any station of which either he or the two above named corporations is not the licensee." Id. at p. 1. The letter further explained that Kay did not hold any license which the Commission would not already have in its own record. Id. at p. 2.

⁷ Brown also specifically asked that the Bureau examine the complaints it had received to determine whether the complainants had made out a prima facie case, taking into consideration the credibility and bias of the complainants. Id. at p. 2.

43. Brown renewed his various legal objections to the Bureau's request for information regarding Kay's U.S. Forest Service permits, including relevancy and the Bureau's refusal to disclose the particulars of the alleged complaints against Kay. Id. at pp. 2-3 & 4. Regarding the request that Kay provide the Bureau with the original grant date and the construction completion date of each of his licenses, Brown responded that there is no requirement that Kay maintain records of license grant dates, that the Commission already had the license grant dates in its own records, and, to the extent Commission rules required Kay to report construction completion dates, he had already done so at the appropriate times. Id. at pp. 3-4.

44. In response to the Bureau's request for Kay's loading numbers, technical configurations, etc., Brown clarified that Kay's combined systems served a grand total of 7,000 units, Id. at p. 4, but he asserted that providing specific loading information as of January 31, 1994 (as the Bureau had requested) could not possibly provide information that would prove or disprove any complaint the Bureau may have received, because the systems are in continual churn with customers being added and deleted all the time. Id. at p. 5. Brown further noted that the loading was not a factor as to any of the specific pending applications which the Bureau was claiming could not be processed absent a response to the 308(b) Request. Id. at p. 5.

45. Brown once again noted the exacerbation of Kay's confidentiality concerns by the Bureau's unexplained request for 50 copies of his response:

The Commission's ... demand that Mr. Kay supply ... 50 copies ... calls into serious doubt for Mr. Kay the Commission's intent to honor his request for confidentiality. Because the confidentiality of the information which the Commission has requested concerning the identity of Mr. Kay's customers is crucial to his business, Mr. Kay respectfully submits that his declining to submit such information to an agency which refuses to promise to keep such information confidential is entirely reasonable, and that in the absence of such a promise ... the Commission's request for such information is not a reasonable exercise of its authority.

Id. at p. 6. Brown submitted only the number of copies of his June 2, 1994, letter required by Section 1.51 of the Commission's Rules. Id. at p. 7. He also included the copyright notice across the bottom of each page.

46. Brown asserted the following extensive legal objection to the Section 308(b) Request:

To date, the Commission has refused to disclose to Mr. Kay the complaints on which it reportedly based [the 30(b) Request], and has refused to postpone the date for him to respond to the Commission's request until such time as the courts can determine, in currently pending [FOIA] litigation, his right to have disclosure of the complaints on which the Commission's request was reportedly based. Mr. Kay is aware that the Commission has, from time to time, received allegations that Mr. Kay had engaged in serious criminal activity. Not only has the Commission refused to allow Mr. Kay to

inspect the complaints which reportedly formed the basis for its request, but the Commission has refused to provide Mr. Kay with immunity from criminal prosecution based on the information which it has requested. The Commission has threatened to impose sanctions on Mr. Kay for failing to comply with the Commission's request for information, including an express intent to sanction him by subjecting him to the cost and loss of time involved in undergoing a hearing before the Commission. With the Commission in the posture of refusing to disclose to Mr. Kay the alleged facts of the complaints which reportedly formed the stated basis for the Commission's request, refusing him a reasonable opportunity to ascertain the specific facts of the reported complaints, refusing to permit him an opportunity to confront his accusers and their accusations, and refusing to provide Mr. Kay with immunity from criminal prosecution, all the while threatening to impose sanctions on Mr. Kay, including the intended abuse of the Commission's hearing process, itself, as a sanction, Mr. Kay respectfully submits that the [308(b) Request] is entirely unjustified and unreasonable, and constitutes a violation of Mr. Kay's right to due process of law, as well as a violation of other rights to which Mr. Kay is entitled under the United States Constitution.

Id. at p. 6.

47. The Bureau sent Brown a responsive letter on June 10, 1994, WTB Ex. 12. The Bureau labeled the response "woefully inadequate" and threatened that it "places Mr. Kay in jeopardy of Commission sanctions which include revocation of licenses, monetary forfeiture, or both." Id. Having heretofore ignored each of Brown's previous objections to the demand for 50 copies, the Bureau now for the first time, in the June 10 letter, modified that "information submitted will be kept confidential...and only 1 original and 1 copy of the information need be filed." Id. The Bureau apparently considered that as "[h]aving removed the basis for Mr. Kay's objections," id., but it did not otherwise substantively address or respond to any of the extensive legal objections put forth in Brown's June 2 letter. The Bureau simply demanded the submission of the information by July 1, 1994, id., and further "warn[ed] ... that your continued posture in this matter places all of Mr. Kay's licenses in jeopardy of revocation." Id. at p. 2.

48. On June 17, 1994, Brown wrote to the Bureau to advise it of a Federal District Court ruling earlier that day whereby the Commission had been directed to provide Kay with a "Vaughn Index" ⁸ of documents that were being withheld notwithstanding Kay's FOIA requests. WTB Ex. 13. Brown explained that "[t]o date, the Commission has not disclosed to Mr. Kay the complaint(s) which reportedly formed the basis for its" 308(b) Request. Id. at p. 2. Brown asked for an extension of time to respond to the Bureau's January 31, 1994 letter (WTB Ex. 12) until after final resolution of the FOIA litigation. He reasoned that this would "give Mr. Kay a fair opportunity to be informed as to the factual basis, if any, of the [complaints] before the Commission demands that he attempt to submit information responsive to those complaints." Id. at p. 2.

⁸ See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

49. On June 22, 1994, the Bureau responded to Brown and denied the request for extension. WTB Ex. 14. The Bureau interpreted "the numerous requests for extension of time, copyright notices and [FOIA] requests...[as] dilatory tactics meant to discourage the Commission from carrying out its statutory responsibility in this matter." *Id.* at p. 1. The Bureau repeated the threat that Kay's "continued posture in this matter places all of its licenses in jeopardy of revocation." *Id.* at p. 2. On June 30, 1994, Brown responded. WTB Ex. 15. As to each of the specific items in the 308(b) Request, Brown referred the Bureau to earlier responses filed on behalf of Kay. *Id.* at pp. 1-2. Brown renewed, clarified, and expanded his legal objection on the ground that the specifics of the alleged complaints had not been disclosed to Kay. *Id.* at pp. 203. Mr. Kay understood that, as of June 30, 1994, he was continuing to refuse to provide the Bureau with some of the information sought in the 308(b) Request, but he indicated that this was because his "attorneys took legal positions in answer to [the 308(b) Request] which are clearly elaborated upon in a series of letters to the Commission." Tr. 1035.

The Northridge Earthquake

50. The Northridge earthquake occurred on January 17, 1994, at 4:31 AM, Pacific Standard Time. Tr. 1416, 1684, 2206, 2270-2271, 2283. This was less than two weeks prior to the Bureau's 308(b) Request.

51. The epicenter of the Northridge earthquake was only 3.5 miles from Kay's business offices and shop in the Van Nuys section of Los Angeles. WTB Ex. 17 at p. 3; Tr. 2211. The earthquake did substantial damage to Kay's business. Randolph French, a bench technician who has worked for Southland for nearly seven years, described the damage as follows: "Well, ceiling tiles broken down, light fixtures from the ceiling falling, steel shelving units dominoed over. Computers smashed, all kinds of parts inventory was, had fallen all over the place." Tr. 2272 (emphasis added).

52. Anthony Marshall, who has been a Southland employee continuously for the past 14 years and on and off for four years prior to that, Tr. 2307, was one of the first of Kay's employees to arrive at Southland shortly after the earthquake on the morning of January 17, 1994. Tr. 2311. Here is how he described what he found upon his arrival.

Jim was there already, and the place was demolished. ... Nothing is where it would have normally have been. The dropped ceiling tiles, the light fixtures on the dropped ceiling, anything at the ceiling levels was on the ground. All the office cubicles were basically busted apart and all over the place. The desks were -- anything that was on top of a desk was on the ground. Computers, typewriters, everything was a complete shambles and a mess. It looked like a tornado had literally gone through the inside of the building.

Tr. 2311-2312.

53. Deborah Kay Marshall (Anthony Marshall's spouse, Tr. 2307), also a Southland employee for the past 14 years, described the damage as follows:

Everything. Cubicles were smashed and caved in on top of one another, on top of computer systems or telephones. Our stock room had shelves, racks that we had built in there, where the radios were all kept. They were all caved in on top of one another. We couldn't even enter that room. The sales floor, where we kept all the radios in showcases, the showcases were all smashed and broken and radios were pretty much on the ground, with everything on top of them. When we went back into the Tech Rooms, we found the same thing. The tech benches were all knocked over, the equipment all knocked over. Things were broken I mean, it was a disaster. We even looked at cracks in the walls, cracks in the floor.

Tr. 2283-2284.

54. Kay himself gave the following picture of the damage:

Basically, the buildings looked liked they'd been picked up, shaken violently up and down and sideways, and then placed back down. Nothing was where it belonged. Bookcases fell over. The floors were strewn with books and papers. My desk collapsed, spewing hundreds of files all over the floor. Credenzas collapsed, spewing files everywhere. The primary computer was damaged at my shop. Water pipes, the water heaters were fractured, spewing water all over everything. Electricity was out. Basically, the place was a disaster. Huge racks that we had radios on in our storage room had teepeed. They'd fallen over, dumping all their contents on the floor, till there was nothing but a pile of radios three feet tall. Some areas were almost impossible to get into, because doors were blocked. You had to use alternative routes to even get in the various parts of the shop. It was basically like a horde of vandals had descended for a number of hours, with the intent of doing nothing but wrecking the place.

Tr. 2340-2341.

55. Kay's personal residence was also damaged in the earthquake and was in total disarray. Tr. 2340, 2516. The damage to Kay's residence currently stands at about \$150,000 to \$200,000 and is still climbing. To this day he is still doing repairs and still finding damage. Tr. 2516-2517. Kay obtained SBA Disaster Loan Assistance, both personally and for his business, which reimbursed only a fraction of the total damages he incurred. Kay Ex. 11.

The Effect of the Earthquake on Kay's State of Mind

56. Jeffrey L. Cohen is a California attorney who began doing legal work for Kay in about 1991. Tr. 2204-2205. During 1992, Cohen communicated with Kay on a weekly basis. Tr. 2205-2206. During 1993, Cohen communicated with Kay at least three times a week and, during the later part of the year, almost on a daily basis. In addition to telephone conversations, Cohen also frequently met with Kay approximately once every two weeks during the first three quarters of 1993, and then about twice a week during the fourth quarter of 1993. Tr. 2206.

57. Cohen testified that there was a remarkable change in Kay's demeanor and personality as well as in his professional and personal habits after the Northridge earthquake. According to Cohen, prior to the earthquake:

[Kay] was a fairly easy client to work with. He was very focused on his business. He understood general basic legal issues. In my dealings with him, basically he would consult with me regarding sometimes general business problems, also the litigation I was representing him with. He would talk about general options and other matters dealing with that, and he would basically listen to what was being presented, discuss the options, and then make the decision based on those matters. He was attentive, demanding, but basically fair to deal with.

Tr. 2207-2208. Kay was almost always responsive to Cohen's requests. Tr. 2208. After the earthquake, however, he changed quite a bit both physically and emotionally. Cohen noticed that Kay did not look healthy, that his skin pallor was different, that he appeared not to be sleeping well, and that his eating habits became atrocious. Tr. 2208. Kay also seemed not to be attending to his personal appearance. Cohen noted that he was not getting his hair cut as often and that he often wore the same clothes and they were much more rumpled. Tr. 2209-2210.

58. Cohen further explained the change in Kay as follows:

His ability to focus on matters was changed considerably. Prior to that time, we had almost established a pattern of how we dealt with any type of legal issue or problem that arose and basically what I would do is give him my view of what we thought was the legal issue and what I thought his goal was, and then I'd give him the various options and we'd discuss the ramifications.

Tr. 2208-2209. Cohen also participated in some conference calls during 1994 with Kay and Brown & Schwaninger, Kay's Washington, D.C. communications attorneys at the time. During these calls, Cohen observed that Kay "was having difficulty understanding the legal ramifications of what was occurring." Tr. 2216. Cohen attributed this to Kay's inability to stay focused. Id.

59. Cohen believed that Kay was depressed as a result of the devastation to his business from the earthquake. Tr. 2210. This opinion was based not solely on his familiarity with Kay, but also on his own personal understanding of the earthquake as a Los Angeles resident who lived through it and was affected by it. Tr. 2207. As Cohen observed, "people who weren't there don't understand the devastation to business that occurred." Tr. 2210. Cohen's law firm continued to represent Kay for approximately two more years after the Northridge earthquake. During this period, he observed a gradual recovery and improvement in Kay's business acumen and ability to concentrate. As Cohen put it: "The farther he got away from the earthquake, the better he was." Tr. 2212. But up until the time Cohen's firm stopped representing Kay, in late 1995 or early 1996, Kay "was never back to what he was prior to the earthquake." Id.

60. Cohen's impressions were corroborated by those who worked with Kay. Randolph Scott French has worked as a bench technician for Southland Communications since May 1992, i.e., for nearly seven years. Tr. 2270. In the course of his duties, French had contact with Kay several times a week. Tr. 2275. He found Kay to be more irritable after the earthquake. Tr. 2276. Deborah Marshall, who has known and worked with Kay on a daily basis for 14 years, testified that Kay was much more impatient after the earthquake and seemed preoccupied. Tr. 2294-2295. Anthony Marshall, who has also known and worked closely with Kay for some 14 years, characterized Kay's behavior after the earthquake as follows:

He was very short and quick to temper on the exact same items that before he would have very patiently explained it to you in detail. Where, after the earthquake, it was like, I don't have time to deal with this. I've got other things on my mind. You know your job, do it and get it done.

Tr. 2313-2314.

Kay's Computer System

61. Kay acquired a computer system in approximately 1988 to 1989 that was based on the Xenix operating system, a system similar to Unix. Tr. 1037. Craig Sobel, who has both computer and accounting expertise, Tr. 1390-1391, has provided consulting services to Kay for the past ten years. Tr. 1392. Craig Sobel had no role in maintaining Kay's Xenix computer system. His duties were limited to programs he wrote for Kay to run on the Xenix system. Tr. 1397. He does, however, maintain Kay's DOS-based system which later replaced the Xenix system. Tr. 1398. Sobel developed a custom billing program for the Xenix system. Tr. 1394-1395. The billing software was designed to cover the repeater services provided by Lucky's; it did not cover Southland's equipment and service operations. Tr. 1395. Craig Sobel made many changes and modifications over the custom billing package over the years. Tr. 1037-1038, 1395.

62. The user interface for the custom billing package designed by Craig Sobel was the "customer maintenance screen". Tr. 1399. Kay's staff used these screens to enter and modify customer data, and they could also bring up and view these screens on a computer monitor. Tr. 1036. The billing software package was never intended as a means of maintaining system loading records for licensing purposes. The primary purpose of the program was to generate customer bills. Tr. 1038. The program was modified in 1992 to allow inclusion of information regarding the number of mobiles a customer might have at a given site. Tr. 1395. Information on the number of mobiles was included primarily as a convenience to Kay and his staff, but it was not audited and was not necessarily accurate or up to date. *Id.* The program design parameters did not require that the number of mobiles even be entered into a customer maintenance screen. Tr. 1422, 1432-1433.

63. Kay was using this Xenix-based custom billing program in January 1994. Tr. 1038. The Xenix system was damaged in the Northridge Earthquake, resulting in frequent crashes and the eventual failure of the system. Tr. 1038, 1416. The Xenix system was replaced in

approximately April 1994 with a DOS-based computer system. Tr. 1039. Craig Sobel was retained to convert the billing system from the Xenix to the DOS system. Tr. 1417. During the process of converting from the Xenix to the DOS system, Craig Sobel discovered that several files had corrupt data and had to be removed. There was no hope of reconstructing the corrupted files. Tr. 1418. The damaged files were removed entirely from the database file, and it would also have been necessary to remove all records dating prior to the date of the damaged records in order to preserve the accounting integrity of the billing program, *i.e.*, to keep it "in balance". Tr. 1428-1431. Craig Sobel testified that the corruption could have resulted from damage to the data files caused by a power shut down or a hardware failure. Tr. 1449. There were power outages at Kay's shop for weeks and months following the January 17, 1994, Northridge earthquake. Tr. 1684, 1688, 2344. Kay and his staff salvaged what data they could from the Xenix system, transferred it to the DOS system, and then set about the task of re-entering the lost data manually from information contained in paper files. It took Kay's staff at least two to three months to re-enter the customer data into the DOS system. Tr. 1039-1040, 1682-1683, 2285.

64. During discovery, Kay produced copies of each customer print screen available in his system as of March 1995, totaling more than 850 pages. WTB Ex. 347. Craig Sobel was retained to modify Kay's system to make it possible to print the screens and to assist Kay's staff in responding to the Bureau's discovery requests. Tr. 1036, 1399. Prior to Craig Sobel's modifications, in order to have generated WTB Ex. No. 347, Kay's staff would have been required to bring up each screen, one at a time, hit the "print screen" button on the terminal keyboard, then walk over to the printer and hit the form feed, and repeat this process more than 800 times. Tr. 1400. This manual procedure would not have been possible, however, under the Xenix system used by Kay prior to April 1994. Tr. 1403. In a good faith effort to comply with discovery demands, Kay had Craig Sobel write a program in March 1995 that could be executed on the DOS system to run this process automatically, and that is how WTB Ex. 347 was generated. Tr. 1400-1401.

65. In November 1995 Kay supplemented his discovery responses by providing the Bureau with so-called "Loading Reports." WTB Ex. 19. WTB Ex. 19 was generated in response to Bureau Interrogatory No. 4 which requested: "With respect to each of the call signs listed in Appendix A [of the HDO], identify each and every 'end-user' (*i.e.*, customer) and the number of mobile units of each 'end-user' (*i.e.*, customer) since January 1, 1991." WTB Ex. 19 at p. 1. Providing information entirely responsive to this request was problematic because, as previously explained, (a) Kay neither maintained nor organized his billing records by call sign, and (b) Kay's billing system was not designed to maintain historical tracking of outdated customer configurations.

66. Kay once again enlisted the assistance of Craig Sobel to prepare the supplemental response that is set forth in WTB Ex. 19. In order to generate this report Kay used a "loading report" feature built into the billing software. Craig Sobel was not sure when this capability was added to the program and did not know whether it was available in the Xenix system that had been in use prior to April 1994. Tr. 1412, 1416. The loading report capability did exist, however, on the DOS system as of November 1995, but it only generated current customer

information. Craig Sobel assisted Kay's staff in generating and printing loading reports that included, to the extent possible, historical data. Tr. 1411-1412. Mr. Sobel explained the procedure as follows:

There was quite a number of customers on Mr. Kay's datafile, customer datafile that had been deleted over the years. ... We had to remove the delete flag from each of these records, store the fact that they were deleted someplace else, calculate these reports, and then redelete them when we were all done.

Tr. 1412.⁹ Craig Sobel also facilitated the printing of the reports by creating a routine that allowed the reports to be calculated and printed as a batch, rather than requiring Kay's staff to generate the reports one-by-one sequentially typing in each frequency and site. Tr. 1413.¹⁰

67. Even with all of these modifications to his system in an effort to respond to the Bureau's discovery request, it was still not possible for Kay to provide a complete and accurate account of historical loading. In the custom billing package designed by Craig Sobel and used by Kay, when data was changed in a particular field, the old data was gone. For example, if a customer record were modified to indicate a change from one frequency to another, or reflect an increase or decrease in the number of mobiles, the old information would be overwritten with the new information and the system would maintain no record of the change. Tr. 1433. Kay did not specifically ask that the billing system be designed in this way. It is simply the way Craig Sobel designed it, and he had seen other systems designed in this manner. Tr. 1437. Accordingly, while WTB Ex. 19 included existing and deleted accounts dating back to September 1993, it included those accounts only in their most recent configuration in the database. Any previous information was no longer reflected. Tr. 1433-1435.

68. James P. Hanno, who testified as an expert witness, has over twenty years experience in the land mobile industry as a licensee, an equipment vendor, and as a consultant. Kay Ex. 63 at ¶¶ 1-4. Hanno examined Kay's billing system and opined as follows:

It is not possible, using Mr. Kay's billing system, to reconstruct a "snapshot" of system loading for a particular past date. There are at least two reasons for this. First, the system is not designed primarily for system maintenance and loading, but rather for

⁹ Normally, when a record is deleted from the database, it is not actually removed, but rather a flag is set indicating to the program that the record has been marked for deletion. The record remains, however, until affirmative steps are taken to permanently remove it, but data in "deleted" records would not be included in any loading reports. Tr. 1428-1429.

¹⁰ It was not necessary to un-suppress deleted records to generate the customer maintenance screens produced in March 1995 (WTB Ex. 347). It was still possible to view (and hence print) a customer maintenance screen after the record had been deleted, however, the data from the deleted record would not, absent the modification, be included in a loading report. Tr. 1436. Accordingly, both WTB Ex. 19 and WTB Ex. 347 represent essentially the same universe of data, but at two different points in time, WTB Ex. 347 being as of March 1995, and WTB Ex. 19 being as of November 1995.